

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Civ. Action 95-133 (RCL)
	)	
	)	
UNITED STATES DEPARTMENT	)	
OF COMMERCE,	)	
	)	
Defendant.	)	
	)	
_____	)	

**MEMORANDUM AND ORDER**

Now before the Court are two motions by the plaintiff. First, the plaintiff moves for leave to depose 25 persons in relation to a FOIA action. Second, the plaintiff moves for an immediate conference to address alleged retaliation against one of its clients. The defendant opposes both motions. For the following reasons, the Court GRANTS in part and DENIES in part plaintiff's motion for leave to depose. Further, the Court DENIES the plaintiff's motion for an immediate conference.

**BACKGROUND**

As the Court and parties are well aware, this is not your average FOIA case. It is a case that implicates high ranking officials in both the Department of Commerce and the White House.

Indeed, as the plaintiff readily admits, this case is part of a larger plan to expose the alleged malfeasances of the Clinton-Gore Administration. The Court notes this political element not to dramatize the issue, but to demonstrate its awareness of the context. Cases filled with political overtures, more than other cases, force courts to hold fast to their constitutional roots, and simply decide "cases" and "controversies" by applying the relevant law to the relevant facts. The Court, starting with the following facts, seeks to do just that.

Judicial Watch first sought information from the Department of Commerce ("DOC") on September 12, 1994. The DOC produced nothing until May 17, 1995, the day after this Court ordered the costs of production waived and the relevant documents to be produced. Judicial Watch was not satisfied with that production, however, and still pressed this Court to order the release of further documents. The DOC sought to dispose of the matter with a motion for summary judgment. On February 1, 1996, the Court not only denied the DOC's motion for summary judgment, but also ordered discovery on the issue of the adequacy of the DOC's search for documents.

As discovery on the adequacy of the search continued, it became clear that the DOC had illegally destroyed and removed many responsive documents from its custody. This revelation caused the DOC to move for summary judgment *against itself*. In an opinion

issued on December 22, 1998, the Court denied the DOC's motion, ordered the DOC to begin a second search for the requested documents, and permitted Judicial Watch further discovery of "any . . . information related to the destruction or removal of documents after . . . [the] FOIA request was filed." *Judicial Watch v. United States Dep't of Commerce*, 34 F. Supp. 2d 28, 46 (D.D.C. 1998).

In accordance with the Court's opinion, Judicial Watch continued its discovery into the DOC's possible frustration of its FOIA request. Its latest find, which is at issue in the instant matter, is the declaration of Sonya Stewart, the former chief of FOIA operations at the DOC. Ms. Stewart asserts that the DOC and other government officials participated in a scheme to avoid the production of documents in both the first and second FOIA searches. In an effort to uncover such misconduct, Judicial Watch now comes before the Court seeking to depose several of the people cited in Ms. Stewart's declaration.<sup>1</sup>

Related to Ms. Stewart's declaration, Judicial Watch also seeks an immediate hearing to address alleged retaliation by government officials against Ms. Stewart. According to the affidavit of someone whose desk is "a few feet away" from the secretary of Ms. Stewart's

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<sup>1</sup> The Court notes that Judicial Watch has also proffered the declaration of Marcia D. Wilson in this matter. It is unclear to the Court the extent to which Judicial Watch relies on this affidavit to support its motion for leave to depose. In any event, the Court has fully considered Ms. Wilson's affidavit in making its decision.

former boss, the former boss intends to "get her" (meaning Ms. Stewart). See Declaration of Cheryl Ambrose at 1.

The Court now addresses each of the plaintiff's motions in turn.

### ANALYSIS

#### A. The Plaintiff's Motion for Leave to Depose

This Court has already held that, based on the extensive evidence of misconduct during the DOC's first FOIA search, the plaintiff may take discovery to further investigate that misconduct. See *Judicial Watch*, 34 F. Supp. 2d at 46. See also *Carney v. United States Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (permitting discovery where evidence demonstrated bad faith by the government). Such discovery, of course, must be limited to documents or persons reasonably thought to possess information of the alleged misconduct. The precise question before the Court, therefore, is whether there is sufficient evidence to conclude that each of the plaintiff's 25 putative deponents possesses information relevant to the alleged misconduct during the first FOIA search.<sup>2</sup>

After a careful reading of the plaintiff's attached

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<sup>2</sup> The Court leaves to the side for the time being the plaintiff's interest in investigating misconduct in relation to the second FOIA search. Although Ms. Stewart's declaration does make a few references to misconduct in the second search, that issue is better left for another day when the Court has the benefit of a full briefing by both parties.

affidavits, the Court finds that the plaintiff may depose some, but not all, of the 25 individuals named in its motions. Sufficient evidence has been presented to suggest that 12 of the 25 individuals possess information relevant to the alleged misconduct. Thus, the Court permits the plaintiff to depose (1) Cheryl Mills, (2) Melissa Moss, (3) George Grafeld, (4) Brenda Dolan, (5) Bobbie Parsons, (6) Barbara Fredericks, (7) Judith Means,<sup>3</sup> (8) Sue Esserman, (9) Frank DeGeorge, (10) John Ost, (11) Bruce Lindsey, and (12) Doris Matsui.

The final two individuals on this list, Burce Lindsey and Doris Matsui, merit a special explanation. Although Ms. Stewart does not allege that these individuals were involved in the evading the FOIA request, she *does* allege that they were involved with the underlying subject of the FOIA search: the sale of trade mission seats for political support. In the Court's view, an individual involved in a pattern of malfeasance would be quite likely to be involved in covering up the activity once an investigation ensues. Thus, it is logical to conclude that Lindsey and Matsui would have information related to the frustration of the plaintiff's FOIA requests.

With regard to the remaining 13 individuals, the Court denies the plaintiff's motion for leave to depose. For 9 of the 11 individuals, the plaintiff has failed to offer evidence that links

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<sup>3</sup> Ms. Means has filed her own objection to the plaintiff's request to depose her. In another opinion issued this date, the Court considered and denied her objection.

the deponents to malfeasance in the first FOIA search. Thus, the plaintiff may not depose (1) Johnnie Frazier, (2) W. Scott Gould, (3) Robert L. Mallett, (4) William M. Daley, (5) John Sopko, (6) Susan Truax, (7) Michael Bopp, (8) Jack Cobb, and (9) Ron Hack.

Finally, the Court finds that, with regard to the four remaining individuals, the plaintiff's evidence is insufficient to warrant a deposition. For three individuals--Lyne-Marie Griffith, Jose Ceballos, and Twanna Smith--the connection to the first FOIA search are not only slight, but also directly contradicted by the declaration of George Grafeld. See Declaration of George Grafeld at ¶ 3, 7, 8 (July 21, 2000). Although the fourth individual, Ms. Dale Lanser, is alleged to have knowledge of the relevant issues in this case, Ms. Lanser's uncontested affidavit reveals that the information she possesses has already been turned over to the plaintiff. See Affidavit of Dale Lanser, September 19, 2000, at 1-2. Thus, as Stewart's affidavit fails to allege that Ms. Lanser has any information not yet turned over, the deposition will not be allowed.

#### B. The Plaintiff's Motion for an Immediate Conference

The plaintiff moves the Court for an immediate conference to discuss the alleged retaliation against Ms. Stewart for her exposure of DOC's alleged misbehavior. The Court declines to order such a conference.

Ms. Stewart, the apparent target of the retaliation, does not state anywhere in her declaration that she was, or is being, harassed by government officials. Rather, the plaintiff proffers the declaration of Cheryl Ambrose, a woman who has a desk "a few feet away" from the secretary of the person allegedly threatening Ms. Stewart. Not only is this evidence highly attenuated, it is controverted by the declarations of the secretary and the former boss, which are presented by the defendant. See Declarations of Susan Smith and Raul Perea-Henze. Given these circumstances, the Court does not deem a conference to be merited. Of course, the plaintiff is always free to return to the Court with further evidence. For now, however, the motion must be denied.

### **CONCLUSION**

For the foregoing reasons, it is hereby

ORDERED that the plaintiff's motion for leave to depose persons identified in the Sonya Stewart declaration [670-1] is GRANTED in part and DENIED in part; further, it is

ORDERED that plaintiff is GRANTED leave to depose, in the presence of Magistrate Judge Facciola, the following individuals:  
(1) Cheryl Mills, (2) Melissa Moss, (3) George Grafeld, (4) Brenda

Dolan, (5) Bobbie Parsons, (6) Barbara Fredericks, (7) Judith Means,<sup>4</sup>  
(8) Sue Esserman, (9) Frank DeGeorge, (10) John Ost, (11) Bruce  
Lindsey, and (12) Doris Matsui; further, it is

ORDERED that the plaintiff's motion for an immediate conference  
[679-1] is DENIED.

SO ORDERED.

Date: \_\_\_\_\_

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ROYCE C. LAMBERTH  
UNITED STATES DISTRICT JUDGE

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<sup>4</sup> Ms. Means has filed her own objection to the plaintiff's request to depose her. In another opinion issued this date, the Court considered and denied her objection.